

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No. A-41, Sub 21

| | | |
|-------------------------------|---|----------------------------|
| VILLAGE OF BALD HEAD ISLAND, |) | |
| Complainant, |) | |
| |) | |
| v. |) | COMPLAINANT’S REPLY |
| |) | TO INITIAL COMMENTS |
| BALD HEAD ISLAND |) | OF PUBLIC STAFF |
| TRANSPORTATION, INC.; BALD |) | |
| HEAD ISLAND LIMITED, LLC; and |) | |
| SHARPVUE CAPITAL, LLC, |) | |
| Respondents. |) | |

Complainant Village of Bald Head Island (“VBHI” or the “Village”), pursuant to the Commission Rule R1-9 and the Commission’s June 17, 2022 *Order Scheduling Hearing and Establishing Procedures*, submits this Reply to the Initial Comments of the Public Staff filed in the above-captioned proceeding on September 8, 2022.

INTRODUCTION

On September 8, 2022, the Public Staff submitted Initial Comments, in lieu of direct testimony, addressing certain factual and legal issues raised in this proceeding concerning the regulatory status of the parking facilities and barge business operations of Bald Head Island Limited (“Limited”) that support the ferry operations of Bald Head Island Transportation (“BHIT”).

The Village anticipates the opportunity to provide comprehensive briefing on the legal issues raised in this proceeding upon the conclusion of the evidentiary hearing in this matter, but wishes to provide a preliminary response to certain issues raised by the Public Staff in its Initial Comments to assist the Commission in framing the issues in dispute.

Specifically, the Village wishes to emphasize that, as regards the regulation of the parking operation, the Public Staff's findings support the need for Commission regulatory oversight of parking—consistent with the Village's position—but that its stated reservations about the extent of that regulation appear to be based on a misreading of dicta from an appellate decision. As regards regulation of the barge operation, the Public Staff's reliance on the "PODS Docket" decision does not foreclose Commission regulation of the barge as a common carrier of persons (i.e., drivers of vehicles) and/or household goods, and, alternatively, the barge could be regulated as an ancillary service.

REPLY

I. Regulation of the Parking Operation

The Public Staff's factual findings regarding the parking operation support the need for Commission oversight of the ferry parking.

First, the Public Staff notes that the "availability of parking is critical" for ferry passengers. Initial Comments, at 5. Specifically, the Public Staff notes that the Bald Head Island ferry is the largest private passenger-only ferry service in North Carolina. *Id.* All passengers must park and leave their vehicles to board the ferry. *Id.* And there "is no reasonable alternative at this time" to the parking lot owned by BHIL. *Id.* at 7.

Second, the Public Staff recognizes that parking is intrinsically linked to the ferry's utility function: the Public Staff found that "the availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers." *Id.* at 5. That is because **"it would be nearly impossible for customers to use the ferry**

without an adequate amount of parking offered at reasonable rates.” *Id.* (emphasis added).

As a result, the Public Staff concludes that it “does warrant Commission scrutiny to ensure that ferry customers are protected through adequate parking at reasonable rates.” *Id.* at 5. This “scrutiny” clearly involves and requires the assertion of regulatory authority by the Commission over parking, consistent with the Village’s request in this proceeding.

However, somewhat in contradiction, the Public Staff concludes that “some level of oversight short of regulation by the Commission” is appropriate for the parking operation. *Id.* at 8. The Public Staff bases its restrictive view of the Commission’s authority on its review of an appellate court decision relating to the historical treatment of telephone yellow pages as ancillary services. *See id.* at 6–7. Specifically, the Public Staff relies on the following two lines of dicta from *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel Co.*, 307 N.C. 541, 544 (1983) (*Southern Bell I*): “[w]e wish to point out that the yellow pages have never been and are not now regulated by the Utilities Commission. However, the fact that a specific activity of a utility is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility.”

There are two critical observations relevant here. First, the quoted language does not assert that the Commission lacks authority—it merely says that the Commission did not regulate the service at that time—and it did so in the context of affirming the attribution of yellow pages revenues to the utility function. Second, the language is dicta—as recognized by the Public Staff itself, as well as the Commission, in later proceedings. In the words of the Public Staff as to this specific language: “that one statement of dictum

clearly was not important to the holding of the case.” *Appellee’s Br. (Public Staff)* at 14, *State ex rel. Utilities Comm’n v. S. Bell Tel. & Tel. Co.*, 93 N.C. App. 260, 377 S.E.2d 772 (1989), *rev’d*, 326 N.C. 522, 391 S.E.2d 487 (1990) (*Southern Bell II*). That is because “whether the Commission regulated yellow pages was not an issue in the case. The Court may have inferred that the Commission did not regulate yellow pages from other facts, such as that yellow page rates are not subject to tariffs, but the regulation issue itself was not before the Court.” *Id.*¹

Furthermore, this Commission disagreed with the *Southern Bell* court’s characterization of yellow pages regulation—in its *Order Denying Motions to Dismiss and Requiring Answers to Complaints*, at 590, issued January 15, 1986 (filed in Docket No. P-55, Sub 855, and P-89, Sub 22), the Commission quoted the *Southern Bell* court’s assertion that “the Yellow Pages have never been and are not now regulated by the Utilities Commission.” The Commission then stated: “Notwithstanding the Court’s statement emphasized immediately above, the Commission must respectfully point out that the Commission has regulated Yellow Pages complaints for years. The Commission reaffirms its decisions that yellow pages advertising is an integral part of telephone service provided by Southern Bell under its public utility obligation.” *Id.* at 591.²

Accordingly, as recognized by the Commission itself, nothing in *Southern Bell* forecloses the regulation of services which are essential, integral or “ancillary” to the utility function—whether it be the parking operation here or yellow pages previously. Indeed, the Commission’s historical treatment of the yellow pages (assuming complaint authority

¹ Relevant excerpts from the Public Staff’s appellate brief are attached hereto as Exhibit 1.

² Relevant excerpts from this decision are attached as Exhibit 2.

and attributing revenues to the utility operation) corroborates that the Commission has exercised regulatory authority over integral and/or ancillary services, even where the service is owned and operated by an affiliated company.

To this point, the Commission currently regulates the tram services provided by BHIT, apparently as ancillary to the ferry, and has done so without controversy for some 20 years. Under the Public Staff's interpretation of *Southern Bell*, this well-established regulatory authority might be called in question.

The Public Staff's narrow reading of the Commission's authority contradicts its own prior position, and that of the Commission. Most importantly, such a reading would substantially impede the Commission's ability to protect the public interest in the provision of adequate utility service when an ancillary service is owned and controlled by either an affiliate of the utility or an unaffiliated third party. This question is particularly relevant here, where (i) the existing arrangement has historically supported the operation of the ferry, and (ii) there is no known practical alternative to the existing parking.

II. Regulation of the Barge Operation

In its Initial Comments, the Public Staff takes the position that the "barge service should not be regulated by the Commission as a common carrier of household goods" because, in the Public Staff's view, a prior decision of the Commission suggests that the barge services are "general transportation service and not the more specific type of service provided by a household goods mover." Initial Comments, at 11. In support of this position, the Public Staff relies on the Commission's *Order Ruling on Request for*

Reconsideration issued March 23, 2004, in Docket No. T-100, Sub 61 (the “PODS Docket”).

The Village does not disagree with the Public Staff’s position that the barge does not provide the sort of specialized home moving services at issue in the PODS docket. However, this specialized type of regulation—which applies to home movers that transport household goods from home-to-home—is only applicable to motor carriers, not water carriers such as barges or ferries. *See, e.g.*, G.S. §§ 62-3(17) (defining “motor carrier” as a common carrier by motor vehicle) & -3(18) (defining “motor vehicle” as self-powered vehicle using State’s highways); N.C.U.C. Rule R2 (applicable to “motor carriers” and prescribing regulations applicable to household goods carriers); September 2022 Revised Maximum Rate Tariff No. 1, NCUC HHG No. 1, filed on September 8, 2022 in Docket No. T-100, Sub 49A, at 68 (defining “carrier” as “Motor carrier of household goods.”). Accordingly, it does not foreclose the regulation of the barge as a common carrier, either of persons (i.e., drivers of vehicles on the barge) or of household goods (loaded onto the vehicles on the barge) or both. Additionally, the barge could be regulated as an ancillary service, independent of its status as a common carrier of household goods.

A. The PODS Docket

In the PODS Docket, PODS³ requested an opinion as to whether its storage service utilizing large containers that are loaded and unloaded by customers would be considered a household goods transportation service requiring certification by the Commission. *Order Ruling on Request for Reconsideration*, at 1. *See also* Attachment to Letter of Barbara A. Sharpe to Andrew K. Light dated August 8, 2003 (filed in Docket No. T-100, Sub 61 on

³ “PODS” stands for Portable On Demand Storage. The name of the company seeking the opinion was “PODS, Inc.”

Oct. 26, 2004). For its part, PODS questioned whether it was “even providing a motor carrier transportation service, as opposed to a service that provides storage containers” Letter of Andrew K. Light to Barbara A. Sharpe dated June 9, 2003, at 2 (filed in Docket No. T-100, Sub 61 on Oct. 26, 2004). In its *Order Ruling on Request for Reconsideration*, the Commission affirmed a prior staff advisory letter concluding that PODS was not a carrier of household goods, and therefore did not need a certificate of authority or exemption from the Commission. The staff advisory letter delineated between the general transportation services provided by PODS and “the more specific type services provided by a household goods mover, such as packing, loading, and unloading.” Letter of Barbara A. Sharpe to Andrew K. Light dated August 8, 2003, at 1 (filed in Docket No. T-100, Sub 61 on Oct. 26, 2004).

In its Initial Comments on September 8, 2022, the Public Staff contended that “[t]he Commission’s decision in the PODS Docket suggests that the services provided by the Barge are a general transportation service and not the more specific type of service provided by a household goods mover.” Initial Comments, at 11. Therefore, the Public Staff concluded, “the Bald Head Island barge service should not be regulated by the Commission as a common carrier of household goods.” *Id.*

The Public Staff is correct that Limited’s barge service is not a household goods mover within the Commission’s traditional application of that service—but that conclusion is not dispositive of the issue here. The Village has never argued that the barge is a traditional mover of household goods—which is limited to motor vehicle services providing transportation services on a home-to-home basis. Rather, the Village has asserted that the barge is a boat that transports household goods and persons between points

in the state as a common carrier. *See* G.S. § 62-3(6). The fact that the Commission regulates home-to-home motor vehicle services does not preclude the regulation of other types of services and the Public Staff engages in no statutory analysis that suggests otherwise.

B. Chapter 62 expressly provides the Commission with authority over transportation of household goods and persons by boat.

The General Assembly expressly included within the scope of the Commission’s regulatory authority the intrastate transportation of household goods and persons by means of transport in addition to motor vehicles—including transportation by “boat.” This grant of authority is repeated in at least three provisions of Chapter 62, including:

- G.S. § 62-3(6) (“‘Common carrier’ means any person, other than a carrier by rail, which holds itself out to the general public to engage in **transportation of persons or household goods** for compensation, including transportation by bus, truck, **boat** or other conveyance”) (emphasis added);
- § 62-3(23)(a)(4) (“‘Public utility’ means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for: . . . **Transporting persons or household goods by motor vehicles or any other form of transportation** for the public for compensation”) (emphasis added); and
- § 62-262(a) (“**no person** shall engage in the **transportation of passengers or household goods** in intrastate commerce unless such person shall have applied to and obtained from the Commission a certificate authorizing such operations, and it shall be unlawful for any person knowingly or wilfully to operate in intrastate commerce in any manner contrary to the provisions of this Article”) (emphasis added).

As regards household goods, there is nothing in the statutory language itself that suggests that the General Assembly sought to limit the regulation of household goods to a particular transportation modality (i.e., motor vehicles) nor is there anything in the statutory

language suggesting that the Commission’s authority arises only when the carrier transports household goods from one home to another.

Indeed, such an interpretation would effectively delete the words “boat” and “other form of transportation” from the statute. No ferry, boat, barge, or ship could perform the “specific type [of] services provided by a household goods mover, such as packing, loading, and unloading,” as contemplated in the PODS decision, unless, perhaps, an individual was moving residences from one dock to another. But “[c]ourts will presume that the ‘legislature intended each portion of a statute to be given full effect and did not intend any provision to be mere surplusage.’” *In the Matter of Application for Approval of DSM & Energy Efficiency Cost Recovery Rider*, N.C.U.C. Docket No. E-2, Sub 931 2009 WL 1171156, at *22 (March 20, 2009) (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 652 (1991)). Accordingly, to give effect to all the words in the statute a broader reading of the transport “household goods” must be afforded in the context of boats than that applied by the Commission to motor carriers.

The PODS decision should be viewed in the context in which it was presented—the context of motor carriers.

C. Chapter 62 expressly provides the Commission with authority over transportation of persons by boat.

Regardless of the transportation of household goods, the barge transports persons (i.e., drivers of the vehicles on the barge) from one place to another.

Limited’s witnesses describe the barge service as a “vehicle delivery service”. However, all of the vehicles have drivers, who are passengers on the barge.⁴ This service

⁴ Under federal law, a *passenger* is any “individual carried on the vessel,” except for the vessel’s owner, the master, crewmembers, or the charterer of a charter vessel. 46 U.S.C. § 2101(29).

is not unlike the State’s nearby Southport-Fort Fisher ferry service, where passengers drive their vehicles on and off the ferry. To this point, the service provided by Limited is unlike a traditional barge service where freight containers are loaded by crane onto a freight vessel. Instead, all materials are conveyed by vehicles which are driven onto the barge—“Owners-operators load their vehicles and equipment directly onto the barge and typically remain with the vehicle during the transit to and/or from the island where they offload their vehicle from the barge to continue to their destination.” *See* Direct Testimony of James W. Fulton, Jr., September 8, 2002, at 5.

The drivers are in no way “incidental” to the service. Limited at no time drives the vehicles. Indeed, the vehicles are being driven onto the barge by delivery drivers, service technicians, or homeowners. In this regard, the barge service is indistinguishable from other passenger ferries that transport vehicles (with passengers) from one place to another and are subject to the regulatory authority of the Commission.⁵

D. The Barge is an Ancillary Service

Independently of its status as a common carrier of household goods, the barge could be regulated as an “ancillary service”⁶ to the ferry, in the same manner as parking and the tram service. The Public Staff concedes that “barge service is undoubtedly critical for those

See also 46 CFR Subchapter I § 90.10-29 (identical definition); Subchapter H § 70.10-1 (identical definition).

⁵ *See, e.g.* Rebuttal Testimony of Dr. Julius A. Wright, at Rebuttal Exhibit JAW-1, (Docket No. A-66, Sub 0; Cape Lookout Cabins and Camps Ferry Service); Rebuttal Exhibit JAW-2 (Docket No. A-65, Sub 0; Davis Shore Ferry Services); Rebuttal Exhibit JAW-3 (Docket No. A-76, Sub 0; Morehead Ferry Service); and Rebuttal Exhibit JAW-4 (Docket No. A-26, Sub 0 and Sub 4; Morris Marina ferry).

⁶ *See* G.S. § 62-3(23)c (defining *service* as “any service furnished by a public utility, including . . . any ancillary service or facility used in connection with such service.”).

living and traveling to and from the island” Initial Comments, at 11. And, as cited by the Public Staff (in relation to the ancillary service provided by ferry parking):

In determining the scope of the Commission’s authority, “the North Carolina Supreme Court found that *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel Co.*, 307 N.C. 541, 299 S.E.2d 763, 1983 N.C. LEXIS 1108 (*Southern Bell I*) “clearly stands for the propositions that: 1) the emphasis should be placed on the *public utility function* rather than a literal reading of the statutory definition of ‘public utility,’ and 2) the statutory definition should not be read so narrowly as to preclude Commission jurisdiction over a function which is required to provide adequate service to the subscribers.” *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 527-528, 391 S.E.2d 487, 490, 1990 N.C. LEXIS 242, 11-12, 115 P.U.R.4th 56 (*Southern Bell II*).

Id. at 5-6. As with the ferry’s parking operation, the barge is a monopoly service, owned by the developer, on private property. As the sole transporter of construction equipment, household goods, food, and equipment to the island, the barge provides an essential service to island residents, visitors, and businesses—every home that is built; every AC that is repaired; every couch that is put in a home; everything that is sold in the store is transported on the barge.

Accordingly, without the barge service, there would be no reason for the vast majority of passengers to ride the ferry to visit the island—there would be no homes in which to reside, no stores or restaurants in which to shop or dine, and extremely limited recreational opportunities. And given the unique nature of the service in issue—requiring access to a port open to navigable waters that has the legal ability to access the port on the island—there is no evidence suggesting that it is practicable or feasible for the service to be provided by some other means. Accordingly, as with the parking and tram service, the barge could be regulated as an “ancillary service” to the ferry.

CONCLUSION

As discussed above and regarding the regulation of Limited’s parking operation, the Public Staff’s findings support the need for Commission regulatory oversight of parking—consistent with the Village’s position. However, the Public Staff’s reservations about the extent of that authority appear to be based on a misreading of an appellate decision. A clearer understanding of the Commission’s authority over essential, integral and/or ancillary services would permit the Commission to exercise regulatory authority over the parking operation.

As regards regulation of the barge operation, the Public Staff’s reliance on the “PODS Docket” decision does not foreclose Commission regulation of the barge as a common carrier of persons (i.e., drivers of vehicles) and/or household goods, and, alternatively, the barge could be regulated as an ancillary service. Accordingly, the Commission should require the issuance of a common carrier certificate as a condition of operation or treat the barge as ancillary to the ferry in the same manner as proposed with respect to parking.

Respectfully submitted, this 28th day of September, 2022.



By:

Marcus W. Trathen
Craig D. Schauer
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304
Email: mtrathen@brookspierce.com
Email: cschauer@brookspierce.com

Jo Anne Sanford
SANFORD LAW OFFICE, PLLC
Post Office Box 28085
Raleigh, North Carolina 27611-8085
Telephone: (919) 210-4900
sanford@sanfordlawoffice.com

Attorneys for Village of Bald Head Island

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainant's Reply to Initial Comments of the Public Staff has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 28th day of September, 2022.

By: /s/ Marcus Trathen

EXHIBIT 1

EXCERPTS FROM APPELLEE'S BRIEF (PUBLIC STAFF)

State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co., 93 N.C.
App. 260, 377 S.E.2d 772 (1989)

NO. 8810UC496

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
EX REL. UTILITIES COMMISSION,)
Intervenor-Appellee)

PUBLIC STAFF OF NORTH CAROLINA)
UTILITIES COMMISSION,)
Intervenor-Appellee)

195 PA 1989

ATTORNEY GENERAL LACY H.)
THORNBURG,)
Intervenor-Appellee,)
and)

THE BOULEVARD FLORIST, INC.,)
Complainant)

v)

From the North Carolina
Utilities Commission
Docket No. P-89, Sub 24

SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY,)
Respondent, and)

BELLSOUTH ADVERTISING &)
PUBLISHING CORPORATION,)
Respondent-Appellant)

APPELLEE'S BRIEF

(Public Staff - North Carolina Utilities Commission)
(Filed 88 AUG 10 AM 9:46)

permanent reference as long as the directory is effective. Newspaper advertisements are of a much more temporary nature. Yellow page advertisements are alphabetized so a reader can find a particular advertisement easily, while newspaper advertisements are neither in any particular order nor are they indexed.

A final reason newspapers cannot successfully compete revolves around habits and perceptions. People have become used to letting "their fingers do the walking through the yellow pages." The SO. BELL Court pointed out,

The yellow pages are a very useful and beneficial component in providing telephone service to the public. In fact as Southern Bell points out on Page 137 in its February 1982, Raleigh, North Carolina Yellow Pages, "4 out of 5 [adults] Look in the Book." On page 265 of that same book we find that every year the yellow pages are referred to "a total of almost 3.69 billion times." Indeed, the yellow pages are more than a convenience to newcomers in town who need a doctor, lawyer, plumber, electrician or any number of services. Newcomers could not be expected to begin in the front of the alphabetical listings and search until they find the desired service. In fact Southern Bell uses that very situation to promote the sales of its advertisements, "Let newcomers get acquainted with you -- Include all of your lines in these Yellow Pages." P 202 of 1982 Raleigh, North Carolina Yellow Pages.

307 NC at 545, 299 SE 2d at 765-66.

In the SO BELL case, the Court upheld the Commission's finding that "[t]he classified directory in which advertising appears, is an integral part of providing adequate telephone service." Id. at 546, 299 SE 2d at 766, quoting the Commission's order. The Commission therefore clearly has jurisdiction over the dispute in the present case.

Appellant argues that SO. BELL is authority for the contrary result. Its argument is based on dictum where the Court said, "We wish to point out that the yellow pages have never been and are not regulated by the Utilities Commission." Id. at 544, 299 SE 2d at 765. This statement however, is immediately preceded by the following discussion:

-14-

Southern Bell points out that the actual transmission of messages across telephone lines does not rely on the yellow pages being available. Although Southern Bell is technically correct in its contention that actual transmission of messages across telephone lines is not dependent on the existence of the yellow pages, such an interpretation of the public utility function is far too narrow. Southern Bell's utility function is to provide adequate service to its subscribers. To suggest that the mere transmission of messages across telephone lines is adequate telephone service is ludicrous.

Id., 299 SE 2d at 765. In light of this discussion and all the other SO. BELL language quoted previously in this Brief, that one statement of dictum clearly was not important to the holding of the case.

Indeed, whether the Commission regulated yellow pages was not an issue in the case. The Court may have inferred that the Commission did not regulate yellow pages from other facts, such as that yellow page rates are not subject to tariffs, but the regulation issue itself was not before the Court.

Appellant also relies on three other cases. In GAS HOUSE, INC. v SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, 289 NC 175, 221 SE 2d 499 (1976) [hereinafter GAS HOUSE], a yellow pages advertiser sought damages in the superior court from Bell because of an erroneously placed advertisement. The Supreme Court held that a contract provision limiting Bell's liability for errors in a yellow pages advertisement was lawful. The Court stated the following in reaching its decision: "The business of carrying directory advertisements in the yellow pages of its directory is not part of a telephone company's public utility business." Id. at 184, 221 SE 2d at 505. The Supreme Court addressed this dictum in SO. BELL, saying,

To the extent that the language in GAS HOUSE is inconsistent with our holding in the case sub judice, that language is overruled. This language does not go so far as to say that the furnishing of a classified listing of subscribers, like that found in the yellow pages, to its customers is not an integral part of the public utility's function of providing adequate telephone service to the citizens of North Carolina. In fact, that is exactly what the Commission found in finding of fact number nine. We therefore uphold the inclusion of the

EXHIBIT 2

**EXCERPTS FROM *ORDER DENYING MOTIONS TO
DISMISS AND REQUIRING ANSWER TO COMPLAINTS***

DOCKET NO. P-55, SUB 855

DOCKET NO. P-89, SUB 22

TELEPHONE - COMPLAINTS

DOCKET NO. P-55, SUB 855
DOCKET NO. P-89, SUB 22

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-55, Sub 855

In the Matter of
Continental Limousine Service, Incorporated,)
Post Office Box 2863, Winston-Salem, North)
Carolina 27102,)
Complainant)

vs.)

Southern Bell Telephone and Telegraph)
Company and BellSouth Advertising and)
Publishing Corporation,)
Respondents)

Docket No. P-89, Sub 22)

In the Matter of)
Ferguson's Hardware, 2900 Hillsborough)
Street, Raleigh, North Carolina 27606,)
Complainant)

vs.)

Southern Bell Telephone and Telegraph)
Company and BellSouth Advertising and)
Publishing Corporation,)
Respondents)

ORDER DENYING MOTIONS TO
DISMISS AND REQUIRING
ANSWER TO COMPLAINTS

BY THE COMMISSION: The above-captioned dockets involve complaints arising out of telephone yellow pages errors. For purposes of this Order the dockets will be considered together.

Procedural History

On December 12, 1984, Continental Limousine Service, Incorporated, of Winston-Salem filed a complaint against BellSouth Advertising and Publishing Company. The complaint letter stated that the basis of the complaint "is that BellSouth Advertising and Publishing Corporation knowingly published identical ads in the Winston-Salem telephone directory which utilized identical affiliate logos." The complaint stated that the remedy sought by Continental Limousine was "simply nonpayment for the ad in the Winston-Salem telephone directory."

On December 17, 1984, the Commission issued an Order serving the complaint on Southern Bell Telephone and Telegraph Company. On January 9, 1985, Southern Bell filed Answer in this docket and Motion to Dismiss. In its Answer, Southern Bell alleged that the complaint of Continental Limousine sought relief for an error allegedly committed by BellSouth Advertising and Publishing Company (BAPCO) in the 1984 Winston-Salem yellow pages; BAPCO is a Georgia corporation engaged in the publishing and advertising business which includes

TELEPHONE - COMPLAINTS

absence of the classified directory would diminish the value of telephone service to the Company's customers."

On appeal of this Order by Southern Bell, the Supreme Court, in Utilities Commission v. Southern Bell, 307 N.C. 541 (1983), upheld the Commission's determination, stating in part as follows:

" . . . we simply point out that the directory advertising operation of Southern Bell is not a separate enterprise from the transmission of telephone messages. The yellow pages are a very useful and beneficial component in providing telephone service to the public. In fact as Southern Bell points out on Page 137 in its February 1982, Raleigh, North Carolina Yellow Pages, '4 out of 5 [adults] Look in the Book.' On page 265 of that same book we find that every year the yellow pages are referred to "a total of almost 3.69 billion times." Indeed, the yellow pages are more than a convenience to newcomers in town who need a doctor, lawyer, plumber, electrician or any number of services. Newcomers could not be expected to begin in the front on the alphabetical listings and search until they find the desired service. In fact Southern Bell uses that very situation to promote the sale of its advertisements, 'Let newcomers get acquainted with you--Include all of your lines in these Yellow Page.'

.

"The result is clear. Southern Bell enjoys a great advantage over all competitors in the field of directory advertising. In addition, this preferred position with all its benefits and revenues is directly related to and a result of the Company's public utility function. For these reasons we agree with the Utilities Commission and the Court of Appeals that the Commission does have the authority to include the expenses, revenues and investments related to directory advertising in its ratemaking proceedings." (307 N.C, at 545, 546)

In its decision, the Supreme Court further noted that the Commission has the authority pursuant to G.S. 62-42(5) to order a public utility to take the necessary action to secure reasonably adequate service for the public's need and convenience. The Court concluded:

"Undoubtedly yellow pages could fall within this provision." (307 N.C. 541, at 547.)

The Supreme Court further stated in this opinion the following:

"We wish to point out that the yellow pages have never been and are not now regulated by the Utilities Commission. However, the fact that a specific activity of a utility is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility. In fact, the revenues and expenses from directory advertisements have historically been included in ratemaking determinations in this state." (Emphasis added) (307 N.C., at 544.)

TELEPHONE - COMPLAINTS

Notwithstanding the Court's statement emphasized immediately above, the Commission must respectfully point out that the Commission has regulated yellow pages complaints for many years.

The Commission reaffirms its decisions that yellow pages advertising is an integral part of telephone service provided by Southern Bell under its public utility obligation. The fact that Southern Bell has voluntarily transferred its yellow pages operations to BAPCO should not excuse Southern Bell from its obligation and should not deprive yellow pages customers of their right of redress before this Commission. A public utility "cannot by contract deprive itself of, or impair, its power to perform its duty to serve the public properly." 65 Am. Jur. 2d Public Utilities, Section 26; 73B CJS Public Utilities, Section 5; Soloman v. Wilmington Sewerage Company, 142 N.C. 439 (1906).

The Commission is of the opinion that BAPCO is a necessary party respondent in these complaint proceedings, since it acts as the agent or alter ego of Southern Bell with respect to the yellow pages advertising operations.

This Order will require Southern Bell and BAPCO to file Answers or offers of settlement to the complaints in these dockets pursuant to Commission Rule R1-9.

IT IS, THEREFORE, ORDERED as follows:

1. That the Motions to Dismiss filed by Southern Bell and BAPCO in this proceeding be, and the same are hereby, denied.
2. That BAPCO and Southern Bell be, and the same are hereby, party respondents in this proceeding.
3. That on or before February 3, 1986, Southern Bell and BAPCO shall file their Answers to the complaints in these dockets or offers of satisfaction with respect thereto, pursuant to Commission Rule R1-9.

ISSUED BY ORDER OF THE COMMISSION.

This the 15th day of January 1986.

(SEAL)

NORTH CAROLINA UTILITIES COMMISSION
Sandra J. Webster, Chief Clerk